IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

STEVEN GEORGE GARCIA,
Appellant.

No. 2 CA-CR 2017-0333
Filed November 15, 2018

Appeal from the Superior Court in Pima County
No. CR20160734001
The Honorable Deborah Bernini, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Chief Counsel
By Tanja K. Kelly, Assistant Attorney General, Tucson
Counsel for Appellee

Joel Feinman, Pima County Public Defender
By Erin K. Sutherland, Assistant Public Defender, Tucson
Counsel for Appellant

MEMORANDUM DECISION

Judge Eppich authored the decision of the Court, in which Presiding Judge Vásquez and Chief Judge Eckerstrom concurred.

E P P I C H, Judge:

¶1 Steven Garcia appeals his convictions for fraudulent scheme and artifice and theft, arguing there was insufficient evidence to support the fraudulent scheme conviction. He further contends the trial court erroneously precluded evidence essential to his defense and imposed excessive restitution. Even if the court did err in precluding some of the evidence in question, the errors were harmless. And because sufficient evidence supports Garcia's fraud conviction and the restitution award reasonably relates to the victim's loss, we affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining the jury's verdicts. *See State v. Allen*, 235 Ariz. 72, ¶ 2 (App. 2014). On May 7, 2015, a customer went to a wholesale car dealership and told Garcia, an employee there, that he was in the market to buy two cars. After Garcia told him that he would have to pay cash to take a car home that day, the customer agreed to purchase the car, signed various forms, and gave Garcia $5,000 in cash. The customer also expressed interest in a second car, but did not buy it because he thought the price was too high.

¶3 A few weeks later, the customer contacted Garcia because he still had not received the title or permanent registration for the car he had bought. Garcia then asked him if he was still interested in the second car because the sales manager had authorized him to lower the price by several thousand dollars. Enticed by the better price, the customer went to the dealership and bought the second car from Garcia for $9,000, again signing paperwork and paying in cash. The first car's temporary license plate was about to expire, so Garcia issued the customer another temporary plate.

¶4 Garcia was responsible for maintaining the dealership's inventory and for completing paperwork and handling the money when he sold a vehicle. But Garcia did not update the dealership's computer system to show the completed sales for either sale to the customer, leaving entries for the cars in a pending status indicating that they were still on the lot and

for sale. He did not submit the sales paperwork to the dealership's corporate office as required; some of it he stuffed in the back of a file cabinet at the lot office. Nor did he deliver the cash to the corporate office.

¶5 After more time passed and the customer still did not have title or registration to either car, he contacted the Department of Transportation to try to discover the source of the delay and learned it had not received title or permanent registration applications for either car. After the Department called the dealership and informed it that the customer had filed a complaint, the dealership investigated and discovered the computer system still showed the two cars as unsold and the dealership's corporate office had not received any of the normal paperwork or cash from either sale. The dealership confirmed the cars were not on its lot and confronted Garcia, who admitted he had taken the money. The dealership fired Garcia and contacted police.

¶6 A grand jury indicted Garcia for one count of fraudulent scheme and artifice, a Class Two felony, and one count of theft between $4,000 and $25,000, a Class Three felony. After a three-day jury trial, Garcia was convicted on both counts and sentenced to concurrent prison terms of six years for fraudulent scheme and artifice and 4.5 years for theft. We have jurisdiction over Garcia's appeal pursuant to A.R.S. §§ 13-4031 and 13-4033(A)(1).

Sufficiency of the Evidence

¶7 Garcia contends the evidence was insufficient to support his fraudulent scheme conviction. He acknowledges that the evidence supports a conclusion he embezzled money from the dealership and thus supports his theft conviction. But he argues there was no evidence of the element that distinguishes a fraudulent scheme from embezzlement, namely, that he "obtained some benefit 'by means of' a specific false picture or pretense." *State v. Johnson*, 179 Ariz. 375, 379 (1994) (quoting *State v. Haas*, 138 Ariz. 413, 423 (1983)).

¶8 We review de novo whether sufficient evidence supports a conviction, and will reverse a conviction only if no substantial evidence supports it. *State v. Denson*, 241 Ariz. 6, ¶ 17 (App. 2016). "Substantial evidence is 'such proof that reasonable persons could accept as adequate and sufficient to support a conclusion of defendant's guilt beyond a reasonable doubt.'" *Id.* (quoting *State v. Mathers*, 165 Ariz. 64, 67 (1990)). On appeal, we view the evidence and draw inferences in the manner most favorable to upholding the verdict. *Id.*

¶9 Section 13-2310(A), A.R.S., provides that a person is guilty of a fraudulent scheme and artifice if the person, "pursuant to a scheme or artifice to defraud, knowingly obtains any benefit by means of false or fraudulent pretenses, representations, promises or material omissions." Relevant here, the state must show that the "defendant's conduct was reasonably calculated to deceive persons of ordinary prudence and comprehension," *State v. Proctor*, 196 Ariz. 557, ¶ 16 (App. 1998), and "by means of" that conduct the defendant "obtain[ed] any benefit," § 13-2310(A); *see also Johnson*, 179 Ariz. at 379. "[T]he fraud statute requires a false pretense to be the *means by which the benefit is obtained*, not the means to avoid detection." *Johnson*, 179 Ariz. at 380. The statute does not require, however, that the victim or anyone else relied on the defendant's deceptive conduct. *See* § 13-2310(B) ("[r]eliance on the part of any person shall not be a necessary element of" the offense); *see also Proctor*, 196 Ariz. 557, ¶¶ 16-17 (rejecting dicta in *Johnson*, 179 Ariz. at 378, suggesting contrary conclusion).

¶10 Garcia argues that evidence he falsified the sales paperwork, failed to follow protocol in submitting the paperwork, destroyed paperwork, failed to submit the cash, and kept the cars in a pending status in the computer system cannot support his conviction for fraudulent scheme or artifice because "none of these things demonstrate the use of a false pretense to *obtain* the benefit." Garcia is correct: Those acts and omissions may have helped Garcia *retain* the cash by hiding his sales of the cars from the dealership, but he did not *obtain* the cash *by means of* those acts and omissions, as the statute requires. *See Johnson*, 179 Ariz. at 380 ("[T]he fraud statute requires a false pretense to be the *means by which the benefit is obtained*, not the means to avoid detection."). Thus, while those acts and omissions show that Garcia was acting "pursuant to a scheme or artifice to defraud" as § 13-2310(A) requires, they do not support the disputed element of the offense.

¶11 Garcia did obtain a benefit, however, by misrepresenting to the customer that his sales manager had given him the authority to discount the price on the second car, inducing the customer to buy the second vehicle at the lower price. Because the customer testified that he believed the original price of the car was too high, the jury could reasonably conclude that the customer would not have made the purchase but for the lowered price, and thus Garcia obtained the customer's cash by means of his misrepresentation. And Garcia made other false or fraudulent pretenses, representations, promises or material omissions to the customer as his means to obtain the cash in both sales. In each instance, he created a false picture to the customer by presenting paperwork to the customer and having the customer complete it as if Garcia was conducting a legitimate

sale on behalf of the dealership. The jury could have reasonably concluded that the customer would not have given Garcia the cash if he knew that Garcia was not going to forward the title and registration paperwork for processing, a material fact of the transactions that Garcia omitted.

¶12 Garcia argues that the false pretense must be directed at the victim listed in the indictment—the dealership. But no such requirement appears on the face of § 13-2310(A). Moreover, § 13-2310(B), by stating that reliance of "any person" is not an element of the offense, appears to contemplate false pretenses directed at anyone, not just listed victims. Our supreme court has stated the legislature intended § 13-2310 to be "broad enough to cover all of the varieties [of fraudulent schemes] made possible by boundless human ingenuity," *Haas*, 138 Ariz. at 424, which presumably would include, for example, a fraudulent scheme to deceive a third party into handing over the named victim's property.

¶13 Garcia quotes *Johnson*'s proposition that the statute "contemplates swindles, Ponzi schemes, confidence games, and similar frauds in which the perpetrator takes advantage of the victim by inducing the latter to turn over property or money based on a false picture painted by the perpetrator." 179 Ariz. at 378. We do not take this general observation as imposing a requirement not found in § 13-2310(A)—that the defendant must have directed the deceptive conduct supporting conviction at a victim, much less the victim named in the indictment. *Cf.* Ariz. R. Crim. P. 13.1(a) ("An 'indictment' . . . is a plain, concise statement of the facts sufficiently definite to inform the defendant of a charged offense."); *State v. Far W. Water & Sewer Inc.*, 224 Ariz. 173, ¶ 36 (App. 2010) ("Under the rules of procedure, 'nothing more is required than that the indictment [ ] be a plain, concise statement of the facts sufficiently definite to inform the defendant of the offense charged.'" (alteration in *Far West*) (quoting *State v. Magana*, 178 Ariz. 416, 418 (App. 1994))).

Evidentiary Rulings

¶14 Garcia next argues the trial court erroneously precluded testimony about the first car's oil leak, contending the evidence showed he had reason to hold onto the sales paperwork and money in case the customer returned the car because of a defect. "We review a trial court's exclusion of evidence for an abuse of discretion, and we review de novo the interpretation of the Rules of Evidence." *State v. Romero*, 239 Ariz. 6, ¶ 11 (2016).

¶15 Before trial, the court ruled that Garcia could impeach the testimony of one of the dealership's sales managers with opinion testimony but not with evidence that the sales manager somehow misrepresented the extent of an oil leak on the first car. As part of its impeachment ruling, the court ruled that it would not allow Garcia to inquire into the oil leak as a specific instance of the sales manager's dishonest conduct. At trial, the customer testified that he had noticed that the first car he bought had a small oil leak. When Garcia followed up by asking the customer if the oil leak continued to be a problem after he took the car home, the court sustained the state's relevance objection. Given evidence that customer returns of cars were possible, Garcia contends the oil leak was relevant as circumstantial evidence that he held onto the money and failed to process the paperwork on the transaction in case the customer decided to return the car.

¶16 The court correctly ruled the oil-leak evidence irrelevant as to the only purpose for which it had been offered, however—to impeach another witness with evidence demonstrating a specific instance of dishonest conduct relating to the oil leak. *See* Ariz. R. Evid. 608(b) (extrinsic evidence generally inadmissible to prove specific instances of a witness's conduct to attack the witness's character for truthfulness). At no time during the discussions or rulings on the oil-leak evidence did Garcia argue it was relevant for the purpose of showing Garcia had a reason to hold the money and paperwork. Because Garcia did not make this argument below, he forfeited all but fundamental error review. *See* Ariz. R. Evid. 103(a)(2) (to preserve claim of error in ruling to exclude evidence, offer of proof required unless substance of evidence apparent from context); *Cohn v. Indus. Comm'n*, 178 Ariz. 395, 399 (1994) (if purpose of excluded testimony not obvious, offer of proof generally required to preserve error); *State v. Lopez*, 217 Ariz. 433, ¶ 6 (App. 2008) (failure to preserve issue forfeits all but fundamental error review).

¶17 Garcia argues that excluding the oil-leak testimony was fundamental error going to the foundation of the case because he was prevented from presenting an innocent explanation for holding onto the paperwork and the money. He contends the jury likely would have reached a different conclusion if the court had not precluded the evidence.

¶18 To prevail under fundamental error review, the defendant must first show error. *See State v. Henderson*, 210 Ariz. 561, ¶ 23 (2005). Only if that threshold is met may a defendant establish fundamental error "by showing that (1) the error went to the foundation of the case, (2) the error took from the defendant a right essential to his defense, *or* (3) the error was

so egregious that he could not possibly have received a fair trial." *State v. Escalante*, 245 Ariz. 135, ¶ 21 (2018). And if the defendant establishes fundamental error under (1) or (2), he must also show prejudice. *Id.*

¶19 Even assuming the trial court erred in precluding evidence expressly offered only for a different, improper purpose, the error was neither fundamental nor prejudicial. If we accept the premise that the oil-leak evidence would have provided an innocent explanation why Garcia withheld the money and paperwork for the first car, it would not have explained why he withheld the money and paperwork on the second car. Garcia has not provided any other innocent explanation for doing so. Thus, Garcia cannot show any likelihood that the oil-leak evidence would have had any effect on the jury's verdicts.

¶20 Garcia also argues the trial court erred in sustaining hearsay objections to the following questions during his cross-examination of a salesman who worked with Garcia:

> Q: The [dealership] folks never told you that [Garcia] stole money; correct?
>
> . . . .
>
> Q: And you never heard that [Garcia] wrote a letter confessing to taking this money; correct?
>
> . . . .
>
> Q: You don't remember if [the general manager] asked you if you took the money; correct?

Garcia contends these three questions were designed to elicit negative answers showing that the referenced statement was not made, and therefore did not call for hearsay, because hearsay is, by definition, a statement, not the absence of a statement. We again review for abuse of discretion, reviewing interpretations of the Rules of Evidence de novo. *Romero*, 239 Ariz. 6, ¶ 11. Hearsay is a statement "the declarant does not make while testifying at the current trial or hearing" that "a party offers in evidence to prove the truth of the matter asserted in the statement." Ariz. R. Evid. 801(c).

¶21 Garcia contends that "[t]he answers would have shown that no one at [the dealership] was talking about the theft, no one was being investigated, and the other person (other than [Garcia]) with the most

access to the money and paperwork was not even questioned," thereby supporting his theory that someone else stole the money and the dealership was covering it up and scapegoating Garcia. But the answers suggested by the leading questions would have merely established that the salesman (1) was not told by the dealership that Garcia stole the money; (2) was not told that Garcia wrote a confession letter; and (3) did not remember if the dealership specifically asked him if he took the cash. Because the salesman testified that the general manager had asked him many questions and was very serious about the matter, these answers would have done nothing to establish the claimed failure to investigate or cover up. Therefore, even if the trial court erred by precluding the answers, the errors were harmless. *See State v. Bible*, 175 Ariz. 549, 588 (1993) ("Error . . . is harmless if we can say, beyond a reasonable doubt, that the error did not contribute to or affect the verdict.").

Restitution

¶22 Garcia next argues that the $13,500 restitution award for the second vehicle, based on the dealership's $13,500 listed price and an industry pricing manual that listed a value of $16,726 for that vehicle, is based on "pure speculation as to the vehicle's actual worth." Garcia contends the trial court ignored the customer's testimony that $9,000 was a fair price for the car based on the price of other cars for sale in the area, and other evidence that the dealership only dealt in cars with "issues" and this car had significant cosmetic damage.

¶23 In Arizona, a person convicted of a criminal offense is required to pay restitution to any victim that has suffered an economic loss "in the full amount of the economic loss." A.R.S. § 13-603(C). "Economic loss includes lost interest, lost earnings and other losses that would not have been incurred but for the offense." A.R.S. § 13-105(16). It is the "functional equivalent" of actual damages in a civil case; it is an amount that "will put the injured party in the position which he was in before he was injured." *State v. Barrett*, 177 Ariz. 46, 47-48 (App. 1993) (quoting *State v. Morris*, 173 Ariz. 14, 17 (App. 1992)). The trial court has substantial discretion in determining the amount of the economic loss. *State v. Madrid*, 207 Ariz. 296, ¶ 5 (App. 2004). In reviewing a restitution order, we view the evidence in the light most favorable to sustaining the order, *State v. Lewis*, 222 Ariz. 321, ¶ 5 (App. 2009), and "uphold a restitution award if it bears a reasonable relationship to the victim's loss," *Madrid*, 207 Ariz. 296, ¶ 5.

¶24 Garcia argues that *Barrett* dictates that the dealership here was not entitled to its lost profit because the claimed lost profit was merely

speculative. *See* 177 Ariz. at 49. In *Barrett*, the defendant bought a car from a dealership with a bad check. *Id.* at 46-47. Police returned the car to the dealership two to three weeks later in substantially the same condition. *Id.* at 47. Shortly after the defendant took the car—possibly as soon as one day after—a new version of the industry pricing manual was published, showing a substantially lower valuation for the car. *Id.* at 47, 48. According to the dealership's finance manager, the lowered valuation impaired the dealership's ability to sell the car for the price it would have been able to, and the dealership eventually had to sell the car for no profit. *Id.* The dealership requested $1,500 to $2,000 in lost profit the finance manager testified the dealership typically realized on a car sale. *Id.* We reversed the trial court's $2,000 restitution award, finding it based on "mere speculation" because there was no evidence that the dealership would have actually sold the car to another buyer at the requested profit in the short time between the defendant's crime and the pricing manual change. *Id.* at 48-49. We concluded that the state had not established a causal relationship between the defendant's crime and the purported lost profit. We held that "[m]ore is required to support a restitution award than the victim's unsupported assurances on the issues of loss causation and amount." *Id.*; *see also State v. Lindsley*, 191 Ariz. 195, 198 (App. 1997) (only losses that "flow directly from or are a direct result of the crime committed" are recoverable; consequential damages "produced by the concurrence of some other causal event" are not).

¶25 Unlike in *Barrett,* where the car was quickly returned to that dealership in the same condition it was when it was taken, seemingly putting that dealership substantially "in the position which [it] was in before [it] was injured," 177 Ariz. at 48 (quoting *Morris*, 173 Ariz. at 17), here the dealership did not regain possession of the car. In *Barrett* the requested amount of lost profit was based on the typical profit for a car of that make, model, and year generally, rather than anything specific about that particular car. *Id.* at 47, 48. Here the requested amount was based on the listed price of the particular car lost, an amount that the court could have reasonably concluded was designed to attract a buyer, not to maximize a restitution award. The fact that the dealership sold the first car to the customer at its listed price is further evidence from which the court could have reasonably concluded that the dealership's list prices were a reasonable approximation of what some customer would likely have been willing to pay. Moreover, the dealership's sales manager at the time, who no longer worked at the dealership at trial, testified that he had expected the car to be sold at the $13,500 price.

¶26 Garcia points to the customer's testimony that the list price was too high given the car's condition and the prices on other cars for sale in the area. But the fact that Garcia lowered the price of the car substantially so he could make a quick cash sale as part of his scheme suggests that the lower price may not have reflected the highest price for which the dealership could have sold the car. Also, the list price was discounted over $3,000 from the industry pricing manual's retail value for a car of that year and model in good condition, suggesting that the list price may have reasonably reflected the car's defects. Finally, as Garcia acknowledges, he did not dispute the amount of restitution at his sentencing, forgoing his opportunity to present additional evidence and argument that may have assisted the court in resolving conflicting valuation evidence in his favor. On these facts, the $13,500 list price appears to bear a reasonable relationship to the amount of the dealership's loss, and the court did not abuse its substantial discretion in imposing restitution in that amount for the second car.

Disposition

¶27 Garcia's convictions and sentences are affirmed.